(29,100)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1922.

No. 550.

WASHINGTON-SOUTHERN NAVIGATION COMPANY

vs.

BALTIMORE & PHILADELPHIA STEAMBOAT COMPANY.

ON CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

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1 In the United States Circuit Court of Appeals for the Third Circuit, October Term, 1921.

No. 2803.

WASHINGTON-SOUTHERN NAVIGATION COMPANY, Appellant,

vs.

BALTIMORE & PHILADELPHIA STEAMBOAT COMPANY, Appellee.

On Appeal from the District Court of the United States for the Eastern District of Pennsylvania.

Before Buffington, Woolley, and Davis, Circuit Judges.

Certificate to the Supreme Court.

In order to be guided to a proper decision of the controversy appearing upon this record, the Circuit Court of Appeals for the Third Circuit desires the instruction of the Supreme Court, and accordingly certifies, under Section 239 of the Judicial Code, a question of law arising from the following facts:

The libellant, charterer of two steamers, filed a libel in personam against the respondent, owner of the steamers, to recover damages in the sum of $120,000 for breach of the charter party. The
2 respondent answered by traversing the essential averments of the libel and filed a cross-libel alleging breach of the charter party by the libellant and seeking damages in the sum of $43,443.25 by way of counterclaim. The respondent in the cross-libel answered by traversing its essential averments and reasserting the averments of the original libel. There was no attachment or seizure of person or property under the libel or cross-libel. Each party filed a bond for costs.

Subsequently, the libellant in the cross-libel (respondent in the original suit) filed a motion praying that the respondent in the cross-libel (libellant in the original suit) be required to give security to respond in damages on its counterclaim and that the proceedings on the original libel be stayed until such security shall be given. This motion was based on Rule 50 of the new Admiralty Rules, quoted in the margin with the added portions, distinguishing it from Rule 53 of the former Admiralty Rules, italicized.[1] The trial court, upon its interpretation of Rule 50, entered an order that if the respondent in the original suit shall give the libellant security to respond in damages, the respondent in the cross-libel shall give

[1] "Whenever a cross-libel is filed upon any counter claim arising out of the same *contract or* cause of action for which the original libel was filed, *and the respondent or claimant in the original suit shall have given security to respond in damages*, the respondent in the cross-libel shall give security in the usual amount and form to respond in damages *to the claims set forth* in said cross-libel, unless the court, for cause shown, shall otherwise direct; and all proceedings on the original libel shall be stayed until such security be given *unless the court otherwise directs.*"

the libellant in the cross-libel security for damages on its counterclaim. The respondent in the original suit, of its own motion and without compulsion, filed its bond for $142,100 conditioned for the payment of the libellant's claim. The respondent in the cross-libel did not give security to respond in damages on the counterclaim of the cross-libel. Thereupon the court entered a decree staying all proceedings on the original libel until its order should be obeyed.

3 The question of law upon which the Circuit Court of Appeals desires the instruction of the Supreme Court is this:

Where a libel and cross-libel are filed in personam, without seizure of person or property, and the respondent in the original suit voluntarily gives security to respond in damages, does Rule 50 of the Admiralty Rules empower the court to stay proceedings in the original suit until the respondent in the cross-libel shall give security to respond in damages to the claims of the cross-libel?

JOS. BUFFINGTON,
Circuit Judge.
VICTOR B. WOOLLEY,
Circuit Judge.
J. WARREN DAVIS,
Circuit Judge.

Endorsements: 2803. Certificate of Question for Supreme Court. Received & Filed Apr. 27, 1922. Saunders Lewis, Jr., Clerk.

4 UNITED STATES OF AMERICA,
Eastern District of Pennsylvania,
Third Judic-al Circuit, sct:

I, Saunders Lewis, Jr., Clerk of the United States Circuit Court of Appeals, for the Third Circuit, do hereby certify the foregoing to be a true and faithful copy of the original certificate of question for decision by the Supreme Court of the United States in the case of Washington-Southern Navigation Co., Appellant, vs. Baltimore & Philadelphia Steamboat Co., Appellee, No. 2803, on file, and now remaining among the records of the said Court, in my office.

In testimony whereof, I have hereunto subscribed my name and affixed the seal of the said Court, at Philadelphia, this 27th day of April, in the year of our Lord one thousand nine hundred and twenty-two and of the Independence of the United States the one hundred and forty-sixth.

[Seal of United States Circuit Court of Appeals, Third Circuit.]

SAUNDERS LEWIS, JR.,
Clerk of the U. S. Circuit Court of Appeals, Third Circuit.

Endorsed on cover: File No. 29,100. U. S. Circuit Court of Appeals, Third Circuit. Term No. 550. Washington-Southern Navigation Company vs. Baltimore & Philadelphia Steamboat Company. Filed August 19th, 1922. File No. 29,100.

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ARGUMENT

The only point involved in this case is the proper construction of a rule of this Court.

The question certified by the Circuit Court of Appeals for the Third Circuit reads as follows:

> "Where a libel and cross-libel are filed *in personam*, without seizure of person or property, and the respondent in the original suit voluntarily gives security to respond in damages, does Rule 50 of the Admiralty Rules empower the Court to stay proceedings in the original suit until the respondent in the cross-libel shall give security to respond in damages to the claims of the cross-libel?"

It will be observed that the question certified is solely as to the *power* of the District Court; no question arises as to the proper exercise of this power if it exists.

Rule 50 reads as follows:

> "Whenever a cross-libel is filed upon any counter-claim arising out of the same contract or cause of action for which the original libel was filed, and the respondent or claimant in the original suit shall have given security to respond in damages, the respondent in the cross-libel shall give security in the usual amount and form to respond in damages to the claims set forth in said cross-libel, unless the Court, for cause shown, shall otherwise direct; and all proceedings on the original libel shall be stayed until such security be given unless the Court otherwise directs."

There can be no question, indeed it is admitted by the appellant, that under the literal terms of this rule, the District Court had the power to enter the order which it did.

The only conditions precedent to the exercise by the District Court of its power to require security from the original libellant to respond to a cross-libel are (1) that the counterclaim set up in the cross-libel shall have been based upon the same contract or cause of action for which the original libel was filed; (2) that the "respondent or claimant in the original suit" shall have given security to respond in damages.

Both of these conditions are present in this case. It is admitted that the counter-claim does arise out of the same contract or cause of action for which the original libel was filed, and it is admitted that the respondent in the original suit has given security to respond in damages.

It is pointed out by libellant, however, that in this case the respondent was not *required* to give security, in order to release property seized upon process issued by libellant, and from this it is argued, based on certain general equitable considerations, that the rule should not apply. It is urged that certain cases construing Admiralty Rule 53, the predecessor of the present rule, sustain this contention. It will be shown later in the brief that the authorities do not sustain appellant's construction, and that the equitable considerations advanced have no substance, but it should first be noted that the language of the rule itself completely negatives the contention that it was not intended to apply except in cases where the libellant had obtained security by adversary process.

The new rule expressly makes the demand for security from the libellant based on the condition that "the respondent or claimant in the original suit shall have given security to respond in damages." The "Claimant," in Admiralty Practice, is the term applied to an owner of property, which has been either libeled in an action *in rem*, or attached in an action

in personam. The use of the term "Claimant" in rule 36, relating to cases of foreign attachment, shows that it applies as well to a respondent in a personal action whose property is attached as to the owner of a ship against which a libel *in rem* has been filed.

On the other hand, if the action is brought *in personam*, and there is no attachment, the respondent's property is not affected, nor is he required to enter security, and he therefore does not become a claimant.

From the use of the words "respondent or claimant" it is evident that the rule was intended to apply to both and that one only was not meant. If it had been intended to refer only to proceedings in which property had been arrested or attached, the rule would have mentioned only cases in which the *claimant* in the original suit had given security; there would be no point in referring to respondent *or* claimant.

That the use of the two words was not accidental is apparent from the fact that in referring to the duty of respondent in the cross-libel to enter security the word respondent only is used.

If the Court in framing the rule had meant it to apply only to cases where property had been seized through libellant's act, it would have said so in plain words.

The changes made in Rule 53 by the promulgation of Rule 50 clearly sustain our view.

Rule 53, in effect prior to the present rule (hereinafter referred to as Rule 53), reads as follows:

> "Whenever a cross-libel is filed upon any counterclaim, arising out of the same cause of action for which the original libel was filed, the respondents in the cross-libel shall give security in the usual amount and form, to respond in damages, as claimed in said cross-libel, unless the court, on cause shown, shall otherwise direct; and all proceedings upon the original libel shall be stayed until such security shall be given."

It will be observed that the principal change introduced by Rule 50 is in adding a condition precedent to the exercise of the power of the Court to require the original libellant to give security; this condition being that the respondent or claimant shall first have given security. It also for the first time gives the Court discretion to refuse to stay the proceedings if it should see fit to do so, the words, "unless the court otherwise directs," being added to that portion of the rule stating that the proceedings shall be stayed unless security be given.

A consideration of the cases to be hereafter referred to, construing Rule 53, makes clear what is apparent upon the face of the rule, that the objects of the changes were (1) to deprive the Court of the power, seldom in fact exercised, of requiring a libellant to give security where no security had been given by the respondent or claimant; (2) to give the Court discretion to allow the proceedings to go on, even in the absence of security being given by libellant, when ordered, it no doubt being thought that there might be hard cases where the Court ought to have this discretion.

It should be especially pointed out that the first change in the rule would have been entirely unnecessary if there were no cases under the old rule where a libellant might not have been required to give security when none had been given by the respondent. Appellant argues that the old rule properly construed did not permit the Court to require entry of security by libellant to answer to a cross-libel except in cases where the property of respondent had been seized and he had given security so that it could be released. But if this be true then why was the change in the rule made? It seems reasonable to assume that this Court had in mind the fact that under the old rule security

might be required of a libellant where respondent had entered no security; to relieve against this apparent hardship, therefore, the stipulation was made that unless respondent had given security none should be required by libellant. But if, as appellant contends, it was already the fact that no security could be demanded of libellant under Rule 53 unless security had been entered by respondent to release seized property, then there was no reason for the change in the rule, and this under all rules of construction is not to be supposed. It follows that appellant's construction should be rejected.

These considerations, it is submitted, should be sufficient to convince the Court that the question certified by the Court of Appeals should be answered in the affirmative, but in view of the argument advanced by the appellant an examination will be made of the construction in the lower courts (no case ever having reached this court) of Rule 53.

Appellant argues that, while it is admitted that Rule 53 applies to actions *in personam*, as well as *in rem*, it applies to actions *in personam* only where the libellant has attached property belonging to the respondent and the respondent has thereupon entered security in order to release his property. The cases it cites do not sustain this construction. It cites Franklin Sugar Ref. Co. v. Funch, 66 Fed. 342 (Appellant's Brief, p. 12), but immediately afterwards admits that this case has been overruled or disregarded, and that its apparent statement that Rule 53 does not apply to actions *in personam* is not law.

In Lochmore S. S. Co. v. Hagar, 78 Fed. 642 (Appellant's Brief, p. 12), the cross-libellant's motion for security was in fact granted. The reasons given in the

quotation from the Court's opinion do not bear directly upon the question now involved; certainly there was no decision that in an action like the present one, the Court would have had no power to require the entry of security.

In Empresa Maritima a Vapor v. North and South American Steam Navigation Co., 16 Fed. 502 (cited in appellant's brief, p. 13, as Empress, etc., Co. v. American Steam Navigation Co.), the cross-libellant's motion for the entry of security was in fact granted. The language quoted from the Court's opinion does not bear upon the question now before us except inferentially; certainly the case is no authority against the construction for which we contend.

In Vianello v. Credit Lyonnais, 15 Fed. 637 (Appellant's Brief, p. 13), the motion for security was also granted. The language quoted from the Court's opinion is merely *dictum*, and does not in fact, under the circumstances of that case, indicate a contrary construction to that for which we contend.

The late case of Interstate Lighterage Co. v. Newtown Creek Towing Co., 259 Fed. 318 (Appellant's Brief, p. 14), is alleged by appellant to be directly in point. The facts were that the libellant had originally brought an action *in rem*, and upon the filing of a cross-libel had been compelled to enter security. Thereafter, it appearing that the libel *in rem* had been incorrectly brought, it was voluntarily discontinued upon payment of costs by libellant and a new libel *in personam* was filed, the vessel apparently being then out of the jurisdiction. The respondent thereupon renewed its motion for security without having given any security on its own part. The Court mentioned the fact that the libellant had been compelled to give up the security originally obtained and had incurred the penalty of costs, and continued:

"To penalize it further by requiring it to give security in addition, in an amount sufficient to cover the cross-libel, even though the cross-libellant is not required to give security, would not be just, and is entirely outside the meaning of Admiralty Rule 53."

The Court continued:

"Nor does it seem a proper exercise of discretion to impose this giving of security as a condition for the discontinuance of the first action."

It is submitted that this case does not support appellant's contention but that on the contrary, it supports appellee's contention; it clearly sustains the *power* of the Court, even in the case before it, to require the giving of security, holding, however, that under the facts of that case its *discretion* should be exercised against the requirement. Under the existing rule, Rule 50, the Court would have had no power to require security from libellant, because respondent had given no security; this was the type of case which no doubt occasioned the change in the rule.

In Prince Line, Limited, v. Mayer & Lage, Inc., 264 Fed. 856 (Appellant's Brief, p. 14), a libel *in personam* was filed without attachment, and Judge Hand denied the motion of respondent to require libellant to file security to answer the claim of a cross-libel. The Court pointed out that libellant had obtained no security and that had the cross-libel been filed as an original libel there could have been no security, and continued:

"This, as it seems to me, is enough to dispose of the motion within that discretion which the fifty-third rule gives, the libellant not having itself got any security."

This case, therefore, clearly does not support appellant's position, but on the contrary supports appel-

lee's position, for Judge Hand clearly held that in refusing the motion he was exercising his *discretion.* This is not a denial of the power but an affirmance of the power—the only question involved here.

Finally, appellant cites The Owego, 289 Fed. 263, but concedes that it does not support its construction.

The argument of appellant from the English statute does not appear to appellee to require any extended answer. Appellant argues correctly that the English statute has been held never to apply where the original libel was *in personam* (Appellant's Brief, p. 11) and yet it is admitted by appellant that the proper construction of Rule 53 is that it does apply to libels *in personam* (Appellant's Brief, p. 12). Clearly, therefore, the American courts have not followed the lead of the English courts if the statute and the rule are to be treated as the same; but they are not the same. The English statute is not quoted by appellant and, perhaps, it is unnecessary for appellee to quote it in full, but it provides that no security is to be entered by cross-respondent unless "in the principal cause the ship of the defendant has been arrested, or security has been given by him to answer the judgment." This would seem to indicate an action *in rem;* the language is quite different from that used in the rule under discussion.

As already indicated no cases sustain appellant's construction of this rule, which admittedly is contrary to its plain terms, but on the contrary such cases as have passed on the point held that Rule 53 did apply to actions *in personam* even where no security was entered by respondent.

Genthner v. Wiley, 85 Fed. 797, is in point. The libellant filed an action *in personam* and it does not appear that there was any attachment of respondent's property; the respondent filed a cross-libel. Under Rule 53, the cross-libellant prayed that proceedings on

the original libel be stayed until cross-respondent entered security. The Court directed that security be entered by the cross-respondent and in so doing used the following language:

> "In Refining Company v. Funch, 66 Fed. 342 (cited in appellant's brief, see *supra*), Judge Butler said that in the Eastern District of Pennsylvania rule 53 was not understood to apply to cases where the original libel was *in personam;* but the Circuit Court of Appeals, in its opinion in the same case, ignored this practice although it would have been applicable to the case before them. Refining Company v. Funch, 73 Fed. 844. In Steamship Company v. Hagar, 78 Fed. 642, Judge Butler himself says that the 'language of the rule applies to all cases of cross-libel,' and this plain language I do not feel at liberty to disregard. Order to issue staying proceedings . . . until stipulation shall be filed . . . pursuant to rule 53."

This case is an instance of the kind of case which led to the change in the rule. It will be observed that, although no security appears to have been filed by the original respondent, the Court directed that the cross-respondent should enter security.

Morse Iron Works & Drydock Co. v. Luckenback, 123 Fed. 332, fully sustains our position as to the power of the Court to direct security to be entered in cases brought *in personam,* where there was no attachment and in fact no security given by the respondent. The Court, however, denied the motion in the exercise of its discretion, on the ground that from an examination of the pleadings the Court was doubtful as to whether the cross-libellant had any claim at all.

Aside from its reference to the authorities, appellant argues that it is inequitable and unjust that the Court should have the power to require a cross-libellant to enter security, except in cases where the original libellant has by his own act required the original

respondent to enter security, either through the attachment of his vessel or through some other means.

In support of this it is argued that the reason for the rule in admiralty is based on the fact that the holder of a claim against a vessel or its owner is entitled at the commencement of the action to file a libel against the vessel or to attach the same or its cargo; therefore, argues appellant, as the libellant has this right, the respondent, but only when such right is exercised, should have a similar right to require the entry of security by libellant, where a cross-libel is filed. Appellant then argues further that, regardless of the wording of Rule 50, the respondent ought not to have the right to have security entered by libellant and cross-respondent, where in fact libellant does not avail himself of the extraordinary remedies above referred to but merely issues a summons *in personam*.

It is respectfully submitted that, regardless of this contention, the rule should be enforced as it was written. But there is a fallacy in the reasoning of appellant. The two parties should be treated equally as appellant argues, but the equality which the rule was intended to provide is equality of opportunity; both parties have the right to security; to hold that the one who commences the action by filing the original libel may elect to deprive his opponent of the right to security would introduce inequality.

As the libellant has the right to attach the property of respondent at the commencement of his action, so the respondent should have the right to require the entry of security by the libellant at the commencement of his cross-action. If libellant is satisfied with the responsibility of the respondent, though himself irresponsible, it would be most inequitable that he could by voluntarily waiving his rights to attach respondent's vessels, disable respondent from requiring the entry of security.

Let us take the case before the Court merely as an illustration, the facts not being shown on the record here although they were in the court below. The respondent had two large vessels within the jurisdiction, but irrespective of that was fully able to respond to any judgment which libellant might secure against it. The libellant, on the other hand, was a corporation formed solely for the purpose of a single maritime adventure, which failed. It had no assets and could not respond to a judgment against it. It came into the jurisdiction and made a claim against respondent; it was at liberty to attach respondent's vessels or otherwise secure itself; it did not need to do this because of the known financial responsibility of respondent; in order to avoid the application of Rule 50 it brought its action *in personam*, and attached no property of respondent. As a matter of justice and equity ought this to disable respondent from requiring the entry of security in the usual course?

If no security is entered by libellant, the case would be tried by libellant on the principle of—"heads I win, tails you lose." If libellant recovers a judgment, it can be collected; if respondent recovers a judgment, it cannot be collected. When the admiralty rules gave a libellant the right to secure himself, they intended to give an equal right to a cross-libellant. To hold with appellant would not afford that equality which the rule intended; one cannot by his voluntary act deprive the other of his rights.

It is not to be overlooked that in addition to its general responsibility, respondent has in fact entered a bond in this case, conditioned to respond in damages if libellant recovers a judgment. The case is, therefore, exactly within the rule. The cross-libel has been brought upon a counterclaim arising out of the same cause of action for which the original libel was filed, and the respondent has given security to respond in

damages. It is therefore respectfully submitted that the district court had the power to require libellant to enter security, and the question certified by the Circuit Court of Appeals should be answered in the affirmative.

Respectfully submitted,

T. R. WHITE,
JOHN CADWALADER, JR.,
Counsel for Appellee.

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I. ABSTRACT OR STATEMENT OF THE CASE.

The Washington-Southern Navigation Company, libellant, filed a libel in Admiralty *in personam* against the Baltimore & Philadelphia Steamboat Company, respondent, in the District Court of the United States for the Eastern District of Pennsylvania, averring that the respondent and one Charles W. Harrison entered into a charter party by which respondent chartered two steamers to Harrison; that Harrison assigned the charter party to libellant; that libellant operated the steamers under the assignment; that the steamers were not as warranted by the charter party; and that by reason of the breach thereof libellant had suffered damages in the sum of $120,000, which it claimed to recover from respondent.

The libel did not pray for any seizure of person or property, and no attachment was issued thereunder. The libellant filed a bond in the sum of $250 for costs.

Respondent filed an answer where it denied the essential averments of the libel, and it filed a bond of $250 for costs.

Respondent afterwards filed a cross-libel, wherein it averred performance by it of its duties under the charter party and breach thereof on the part of the libellant; and that by reason thereof respondent had suffered damages in the sum of $43,423.55, which it claimed to recover from libellant. There was no attachment or seizure of person or property under the cross-libel.

Cross-respondent filed an answer wherein it denied the averments of the cross-libel and reasserted the averments of the original libel.

Subsequently cross-libellant filed a motion wherein it prayed that cross-respondent be required to enter security for payment of the claim of cross-libellant

and that the proceedings on the original libel be stayed until such security should be entered. To this motion an answer was filed.

The case was argued on motion and answer before the Hon. J. Whitaker Thompson, of the District Court, who filed an opinion (271 Fed. 540) wherein he decided that if the respondent should enter security for payment of libellant's claim, cross-respondent should enter security for payment of cross-libellant's claim.

Thereafter respondent filed its bond, with approved surety, in the sum of $142,100, conditioned for the payment of the claim of libellant. No security was entered by cross-respondent for payment of the claim of cross-libellant.

Thereafter, on July 11, 1921, the Court entered an order and decree reciting that the cross-respondent had not entered security under the aforesaid conditions and directing that all proceedings on the original libel be stayed until such security be given.

From this order and decree the libellant appealed to the Circuit Court of Appeals for the Third Circuit; and after argument the Circuit Court of Appeals certified the following question to this Court:

> "Where a libel and cross-libel are filed *in personam*, without seizure of person or property, and the respondent in the original suit voluntarily gives security to respond in damages, does Rule 50 of the Admiralty Rules empower the court to stay proceedings in the original suit until the respondent in the cross-libel shall give security to respond in damages to the claims of the cross-libel?"

II. SPECIFICATION OF ERRORS.

No assignments of error were filed in this court, since the case comes before it on a question certified to it by the Circuit Court of Appeals for the Third Circuit.

The assignments of error filed in the Circuit Court of Appeals were as follows:

"1. The learned Court erred in not dismissing the motion of the cross-libellant for an order directing the cross-respondent to enter security.

"2. The learned Court erred in holding as follows:

" 'It is therefore ordered that, if the respondent shall give security to respond in damages in the original suit within ten days, the cross-respondent shall give security for the cross-libellant's damages.'

"3. The learned Court erred in entering the following order and decree:

" 'AND Now, July 11, 1921, the cause came on to be heard on motion of Baltimore and Philadelphia Steamboat Company, respondent and cross-libellant, for an order and decree directing Washington-Southern Navigation Company, libellant and cross-respondent, to enter security for the satisfaction of the claim of the cross-libellant and for stay of proceedings on the original libel until such security be entered, and the answer of libellant and cross-respondent to said motion and affidavit in support thereof, and was argued by counsel, and, it appearing to the Court that security has been entered by respondent for payment of the claim of libellant, and that no security has been entered by cross-respondent for the payment of the claim of cross-libellant, it is ordered and decreed that all proceedings on the original libel be staved until such security be given, pursuant to Rule No. 50 of the Admiralty Rules promulgated by the Supreme Court of the United States, on December 6, 1920.' "

III. BRIEF OF ARGUMENT.

This case involves the construction of Rule 50 of the Admiralty Rules promulgated by this Court on December 6, 1920, and comes before the Court upon the following question certified to it by the Circuit Court of Appeals for the Third Circuit:

> "Where a libel and cross-libel are filed *in personam*, without seizure of person or property, and the respondent in the original suit voluntarily gives security to respond in damages, does Rule 50 of the Admiralty Rules empower the Court to stay proceedings in the original suit until the respondent in the cross-libel shall give security to respond in damages to the claims of the cross-libel?"

Rule No. 50, which is now in question, is an amendment of former Rule No. 53 of the Admiralty Rules. It adopted the language of Rule 53 with certain additions, and in its present form is as follows (the added words being printed in italics):

> "Whenever a cross-libel is filed upon any counter-claim arising out of the same *contract* or cause of action for which the original libel was filed, *and the respondent or claimant in the original suit shall have given security to respond in damages*, the respondent in the cross-libel shall give security in the usual amount and form to respond in damages *to the claims set forth* in said cross-libel, unless the Court, for cause shown, shall otherwise direct; and all proceedings on the original libel shall be stayed until such security be given *unless the Court otherwise directs.*"

Neither Rule 50 nor the former Rule 53 has been construed by this Court, so far as the investigation of counsel has gone, nor has the question here pre-

sented come before any Circuit Court of Appeals. The question of the scope of Rule 50 is a very important one, and it was for that reason, as well as on account of the lack of authority, that the question was certified to this Court. In the absence of a decision, or even of an indirect expression of an opinion, by this Court, the case must be argued largely on principle, though the cases in the lower courts will be referred to hereafter.

To approach the question of the meaning of Rule 50 and its predecessor Rule 53, we must first ask: "What was the occasion for such a Rule?" in other words, is there something in Admiralty practice which is peculiar, which we do not find either in the statutes or rules of court governing actions at common law and in equity? The answer is self-evident. There is a special provision in Admiralty which gives the holder of a claim against the owner of a vessel the right to start his action, not by merely issuing a writ, as he would do in an ordinary action of assumpsit, but by attaching the vessel itself and requiring the owner to file a bond in order to obtain the release of the vessel. In other words, the holder of a claim against a vessel or its owner may file a libel *in rem*, or a libel *in personam* with a clause of attachment, averring an indebtedness of any amount, and the vessel or property attached remains in the hands of the Marshal until the respondent or claimant files an approved bond for payment of libellant's claim and interest, obtained perhaps with difficulty and certainly with expense. In such a case is it not just and equitable for the Court to say to the libellant: "You have made it necessary for the respondent to enter security for payment of your claim; therefore you will enter security for payment of his counter-claim, if he has one, or your action will be stayed"?

This, we contend, is the origin of and reason for

Rules 53 and 50, and under these circumstances they appeal to our sense of fairness. But if the libellant, instead of availing himself of the extraordinary remedy above-mentioned, is content to merely issue a summons *in personam* against the respondent, as in an ordinary action at law or in equity, and take the chance of recovering the fruits of his judgment after the decision of the Court, a very different state of affairs arises. Under these circumstances there is no occasion for security by either side; the libellant has not asked for any and has done nothing which makes it incumbent on the respondent to enter it; and there is no reason whatever for the respondent to ask for security for payment of his counterclaim against an adversary who is willing to meet him on equal terms.

We therefore submit the proposition that in formulating Rules 53 and 50, your Honorable Court had in mind the peculiar right and power of a libellant in Admiralty to obtain security for payment of his claim before the latter had been adjudicated by the Court, and that the rules were intended to give, and did give, a corresponding right to the other side; but that they were never intended to apply to a case such as arises from the facts at bar, *viz.*, where the libellant relies, not on his extraordinary power, but merely on the ordinary process familiar in actions at law.

Counsel for the respondent, however, take the position that the rules were wider in scope and in all cases give the respondent the right to demand security from the libellant merely by tendering security himself, irrespective of the question whether or not the libellant has demanded security from the respondent or done anything whatever which would necessitate the respondent to enter it, and they seek to justify their position by arguing that the reason for the rule

is that the libellant might be insolvent and the respondent solvent. If their contention were correct, it would follow that a respondent whose financial credit is good would in every instance be able to compel a less fortunate libellant, who is unable to obtain a bond the amount of which is based, perhaps, on a swelled or exaggerated counter-claim, from ever bringing the merits of the claim and counter-claim before the court. This argument, which is the basis of respondent's construction of Rules 53 and 50, must be carefully considered.

The first thought that this contention suggests is that if it expressed a rule of law, justice or equity, it might be expected to be found in the procedure of some tribunal other than of a Court of Admiralty, where the libellant is given the right of obtaining security in the first instance, as above set forth. One would have thought that your Honorable Court, in formulating the rules of equity practice for United States Courts, would have provided that if the respondent voluntarily enters security for the payment of the original claim, he may compel the complainant to enter security for his counter-claim before the action may be tried. One would have thought that Congress in legislating for actions of assumpsit in Federal Courts, or one of the State Legislatures in doing the same for actions in State courts, would have provided for this contingency. But we find a total absence of such provisions. And why? Simply because it has always been the policy of American law to allow suitors to litigate their claims before the Courts without entering into the question whether or not they will afterwards be able to collect the amount of the judgments or decrees. We do not refer to security for costs, since in the case at bar each side was required to, and did, enter a bond for costs. There is no other

instance in the law where it has even been contended that the solvency or insolvency of a party furnishes the criterion as to whether or not he shall be permitted to try his case; that is the question to be considered by the opposite party when he makes the contract, not when the parties meet in court. There is an undoubted and fully justified exception in Admiralty where a libellant, not content with going into court on the ordinary terms, compels the respondent to enter security by first tying up his property, but no reason has ever been suggested why, when he merely issues process against the respondent without any attachment or seizure, he should stand in any position different from that of a plaintiff in an action of assumpsit or the complainant in a bill in equity.

Counsel for the respondent contend that since the language of Rule 50 is broad enough to cover this case, it must be interpreted to cover it. The answer is obvious. The rule on its face says that it shall operate when "the respondent or claimant in the original suit shall have given security to respond in damages." How or under what circumstances this security is given is not stated on the face of the rule, but is left open to the interpretation of the courts. There is nothing in the rule which states that it shall apply in a case similar to the one at bar, but it is a pure matter of construction.

Moreover, if it should be held that the general language of the rule includes the facts of this case, it would merely bring us to the familiar principle of law that the general language of a statute, and equally of a rule of court, may be restricted in operation by a consideration of the circumstances under which it was enacted or adopted, the mischief which it was intended to remedy, and the evident object which its framers had in mind at the time of its enactment.

"Such a construction ought to be put upon a statute as will best answer the intention which the makers had in view . . . Many cases were mentioned where it was held that *matters embraced in the general words of statutes, nevertheless were not within the statutes because it would not have been the intention of the lawmakers that they should be included.* They were taken out of the statutes by an equitable construction."

Per Mr. Justice Peckham in Beley v. Naphtaly, 169 U. S. 353 (1897).

"As was said by Mr. Chief Justice Taney, 'It is undoubtedly the duty of the Court to ascertain the meaning of the legislature from the words used in the statute, and the subject matter to which it relates, *and to restrain its operation within narrower limits than its words import if the Court are satisfied that the literal meaning of its language would extend to cases which the legislature never designed to include in it.*' Brower v. Blougher, 14 Pet. 178, at 198; Petri v. Commercial National Bank of Chicago, 142 U. S. 644, 650."

Per Mr. Justice Peckham in McKee v. U. S., 164 U. S. 287 (1896)

"But there is another question underlying this and all of the other rules for the interpretation of statutes, and that is, what was the intention of the legislative body? Without going back to the famous case of the drawing of blood in the streets of Bologna the books are full of authorities to the effect that the intention of the lawmaking power will prevail, *even against the letter of the statute,* or, as tersely expressed by Mr. Justice Swayne in Smythe v. Fiske, 23 Wall. 374, 380: '*A thing may be within the letter of a statute and not within its meaning, and within its meaning though not within its letter.* The intention of the lawmaker is the law.'"

Per Mr. Justice Brown in Hawaii v. Mankichi, 190 U. S. 197 (1902).

"They (rules of court) must be construed as statutes would be construed."

Per Shackelford, C. J., in Florida, &c. Co. v. Anderson, 50 Fla. 516 (1905).

"Rules adopted solely for the convenience of the court and of suitors appearing before it should be construed liberally, with a view to the submission of cases upon their merits, *and should not, by a literal interpretation, be extended to cases which are not within their true spirit and meaning.*"

18 Am. & Eng. Encyc. of Law, p. 1262.

"The whole object and design of adopting rules of practice is, and ought to be, to facilitate the business of the Court and promote the ends of justice. *And in the construction of all rules, attention must be paid to the manifest object the Court had in making the rule* . . . Such cannot be the fair and legitimate construction of the rule in question. *Whatever may be its letter, such is not the true spirit of the rule.*"

Per Nevius, J., in Ferguson v. Kays, 21 N. J. L. 431 (1848).

Further information may be obtained as to the interpretation of Rules 53 and 50 by considering their history.

"Rule 53 was adopted from section 34 of the English statute of 1861, called the 'Admiralty Court Act.'"

Old Dominion S. S. Co. v. Kufahl, 100 Fed. 331 (1901).

The Admiralty Court Act of 1861 (24 Vict. c. 10, sec. 34), while differing in language, is similar in effect to Rule 50 of our Admiralty Rules, and gives the respondent the right to demand security from the

libellant for the payment of the cross demand "if in the principal cause the ship of the defendant (respondent) has been arrested or security given to answer judgment."

It was held by the Court of Appeal of England that the act did not apply where the original libel was *in personam* and there was no seizure of property thereunder: The James Westall, (1905) Prob. 47; and this is its settled construction: See Halsbury's Laws of England, Vol. I, page 95n.

Former Rule 53 of the Admiralty Rules, for which present Rule 50 has been substituted, if it had been interpreted literally, would have enabled a cross-libellant to obtain security from the cross-respondent in every case, irrespective of the question whether the cross-libellant had furnished, or been compelled to furnish, security for the libellant's claim; for the words of the rule were without exception; and apparently counsel in some of the cases hereafter referred to attempted to urge this literal construction of the rule on the district courts. This contention was universally rejected by the district courts, which held that Rule 53 applied only to those cases where libellant had obtained the advantage of security. Rule 50 narrowed the scope of Rule 53 by expressly restricting it to those cases where the respondent or claimant had entered security; and it would seem to be a fair inference that Rule 50 was intended to embody the construction placed by the District Courts on Rule 53, even though the question had not come before the appellate courts.

Some doubt was entertained by the district judges as to whether Rule 53 applied to libels *in personam* at all, for the reason that generally in such actions there was no occasion for the respondent to enter security, and security was therefore not entered.

Thus in the case of Franklin Sugar Refining Com-

pany v. Funch, 66 Fed. 342 (1895), there was a libel *in personam* where no attachment of property had been asked for or allowed, but respondent moved for the entry of security under Rule 53. Butler, P. J., said:

> "I do not think this order should be allowed. It seems to me doubtful whether Rule 53 contemplates a case where the original libel is *in personam*, and where consequently no security is required of the respondent in the original cause; its terms do not seem applicable to such a case. It calls for security in the usual amount and form, etc.
>
> "*Where the original libel is in personam there is no such usual amount and form of security to which security from the respondent in the cross-libel may be made to conform, as the rule seems to call for.*
>
> "The rule had not been understood in this district to apply to such cases and has never been so applied."

The decree denying the motion was affirmed by the Circuit Court of Appeals for the Third Circuit, on other grounds: Franklin Sugar Ref. Co. v. Funch, 20 C. C. A. 61, 73 Fed. 844 (1896).

It was afterwards decided, and properly decided, that Rule 53 did apply to libels *in personam*, but only to such libels as contained a prayer for an attachment under which property of the respondent was seized, and he was compelled to enter security to regain possession of it. As was said by Judge Butler in the case of Lochmore S. S. Co. v. Hager, 78 Fed. 642 (1897), in dismissing a motion to vacate security on a cross libel:

> "While the original libel is *in personam* in form, it prays for an attachment, and the vessel to which the charter party sued upon relates was at-

tached, and the proceeding therefore is in effect *in rem. The object of the attachment was not simply to procure the respondent's appearance, but to collect the money demanded from the vessel. Here release could only be effected by entering security for the debt, as in ordinary proceedings in rem. . . . The rule must therefore be held applicable to the action.*"

It was universally held that the object of Rule 53 was to put both parties on an equality. In the case of Empress, etc., Co. v. American Steam Navigation Co., 16 Fed. 502 (1883), Judge Brown said:

> "The object of Rule 53, I cannot doubt, was that in case of cross-demands upon the same subject of litigation both parties should stand upon equal terms as respects security. It was designed when libellants in a suit *in rem*, through the arrest of property, exact and obtain security for their own demand, that in a cross-suit *in personam* for a counter-claim in respect to the same subject of litigation, the defendants in the former suit should likewise be entitled to security for the payment of their demands, in case the decision of the Court upon the point in controversy should be in their favor. *The rule was designed to correct the inequality and injustice of the process of the Court in rem, being used to obtain security in favor of one party, in reference to a single subject of dispute, which it denied to the other.*"

The same thought had been expressd by Judge Brown in the case of Vianello v. Credit Lyonnaise, 15 Fed. 637 (1882), where he said:

> "It is just that in such cases each side should be similarly protected by security; and the original libellants having obtained security for their alleged claim by the arrest of the bark, they ought not to complain of being required to furnish se-

curity in turn upon the counter claim. Such I think was the intention of the rule."

The late case of Interstate Lighterage Co. v. Newton Creek Towing Co., 259 Fed. 318 (1919), is directly in point. There a libel *in rem* was filed and respondent, who had been compelled to enter security, had obtained an order directing libellant to enter security. The original libel was afterwards discontinued, and a libel *in personam* was brought, and in this action the original cross-libel was transferred so as to operate in the second action. Respondent then moved for an order directing libellant to enter security, which was denied, Judge Chatfield saying:

> "The purpose of the rule (53) is evidently to make both parties secure. Where the libellant by proceeding *in rem* with a foreign attachment (Lochmore S. S. Co. v. Hager, 78 Fed. 642) has security against the claimant, but where the claimant by bringing a cross-libel *in personam* does not have the property under seizure to secure himself, the rule is plain.
>
> *"But we have here a situation where the libellant has been compelled to give up any security which it may have had under its former erroneous cause of action. . . . The first cause of action having been dismissed, the rule no longer fits the situation.* Nor does it seem a proper exercise of discretion to impose the giving of security as a condition for the discontinuance of the first action."

A motion for the entry of security was therefore denied.

This case was followed by the late case of Prince Line, Limited, v. Mayer & Lage, Inc., 264 Fed. 856 (1920), where a libel *in personam* was filed without any attachment. A cross-libel was filed and cross-

libellant moved for the entry of security under Rule 53. The motion was denied, Judge Hand saying:

> "The libellant is a domestic corporation, and filed a libel *in personam* against the respondent, a foreign corporation without attachment. Later the cross-libel was filed *in personam,* and the cross-libellant moves now for security under the fifty-third rule. Obviously had the cross-libel been original, no security could have been required under the second rule (29 Sup. Ct. xxxix), as the respondent could have been found. *This, as it seems to me, is enough to dispose of the motion within that discretion which the fifty-third rule gives, the libellant not having itself got any security.* Had it done so, this motion would have lain as of course."

The foregoing cases show the construction which had been placed upon Rule 53 by the district courts. The construction of Rule 50 does not seem to have come even before the district courts, except in the case of The Owego, 289 Fed. 263 (1923). In that case the claimant (cross-libellant) had not entered security, and the Court therefore held that he was not entitled to demand security from the cross-respondent.

It may be confidently asserted that until the district court entered the order in the case at bar, there was no reported case where a cross-libellant had been permitted to demand security from a cross-respondent by merely tendering security, where the original libellant had done nothing to compel him to enter security, or if there is such a decision, it has not come to the notice of counsel.

The real question presented by the certificate of the Circuit Court of Appeals in this case is whether or not parties in Admiralty stand on equality as they do in cases of *assumpsit* or trespass, or whether a respondent, who is able to obtain security, is able to

put a less fortunate libellant out of court and prevent him from having his rights determined, because the libellant is unable to furnish security. No question of costs is involved, since both parties have entered security for costs and if this security should appear insufficient, the Court would have power to increase it under Rule 8. It is conceded that where libellant, by seizure or attachment of respondent's property, compels the entry of security for its release, libellant should place respondent in a similar position, but it has never yet been decided that a respondent who has not been constrained by any act of libellant to enter security may by voluntarily doing so prevent a decision of the case on the merits. In fact, the decisions of the district courts all lead to the opposite conclusion, and they are in accord with every principle of justice and equity.

From the foregoing, we advance the following propositions:

(1) Rule 50 was designed to place the parties on an exact equality, and not to give one of them an advantage over the other.

(2) The rule applies alike to actions *in rem* and *in personam*, but in the latter case only where there is a seizure of person or property under the original libel.

(3) The rule has no application in the case of a libel *in personam* where there is no attachment of respondent's person or property and where the libellant has done nothing to require the respondent to enter security.

(4) The rule was never designed to place it within the power of one of the parties to an action

in Admiralty, by his voluntary act and without compulsion by the other party, to cause the trial of the action to be stayed.

It is therefore respectfully submitted that the question certified by the Circuit Court of Appeals for the Third Circuit should be answered in the negative.

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for Washington-Southern Navigation Company.